Legal Aspects of Incident Management

Mr. W. Darrell Phillips

THE JUDGE ADVOCATE GENERAL'S SCHOOL

Agenda

- **Posse Comitatus**
- **Defense Support of Civil Authorities**
- **National Defense Areas**
- **Environmental Issues**
- **Claims**

DoD References

- DoDD 3025.15, Military Assistance to Civil Authorities (“umbrella”)
- DoDD 3025.1, Military Support to Civil Authorities (MSCA)
- DoDD 3025.12, Military Assistance for Civil Disturbances (MACDIS)
- CJCSI 3710.01A, DOD Counterdrug Support

Posse Comitatus

- Latin: "power or force of the county"
- Posse Comitatus Act
  - Originally enacted in 187
  - Intended to ensure milita subordination to a strong civil authority

Posse Comitatus Act
18 U.S.C. 1385

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned for not

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Posse Comitatus Act

- Who
- What/When

Posse Comitatus Act

- Who
  - Active duty Army
  - Active duty Air Force

Posse Comitatus Act
Who?

- Active duty Navy/Marines?
  - Courts: No
  - Congress: No, but . . .
    - 1974, allowed amendment to die
    - 1981, 10 USC § 3

Posse Comitatus Act
Who?

- **10 USC § 375**
  - **Directed SECDEF to prescribe regulations to prohibit direct participation by a member of the Army, *Navy*, Air Force, or *Marine Corps* in a search, seizure, arrest, or other similar activity unless . . . otherwise authorized by law**
  - **DoDD 5525.5 prohibits participation by DoD civilian employees "under the direct command and control of a military officer"**
    - **Contractors?**
  - **NOT Coast Guard**

Posse Comitatus Act
Who?

- Reservists and National Guard?
  - Reservists: Yes, if on active duty, active duty for training, or inactive duty for training
  - National Guard: Yes, if in Federal status (Title 10)

Posse Comitatus Act
What/When?

- Can not “execute the laws”
- Prohibits **direct assistance** to civilian law enforcement officials

Posse Comitatus Act

- **Regulation: DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials**
  - **Defines prohibited direct assistance as:**
    - **Interdiction**
    - **Search or seizure**
    - **Arrest, apprehension, stop and frisk**
    - **Surveillance/pursuit of personnel, undercover agents, informants, investigators, interrogators**

"Defense Support of Civil Authorities"

Military Assistance to Civil Authorities
3025.15

Emergencies
3025.1

Disturbances
3025.12

Law Enforcement
5525.5

Miscellaneous Support

Counterdrug
3710.01

DRAFT DoD DIRECTIVES

- DoD Directive 3025.dd, Defense Support of Civil Authorities
  - Replaces 3025.15, 3025.1, and 3025.12
- DoD 3025.dd-M, DoD Manual for Defense Support of Civil Authorities

Civil Support
DoDD 3025.15

- Governs all DoD military assistance to civil authorities
- Evaluation criteria for requests
  - Legality
  - Lethality
  - Risk
  - Cost
  - Appropriateness
  - Impact on Readine

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Support to Law Enforcement

- DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials
- *Primary Concern:* Potential violations of the Posse Comitatus Act

Support to Law Enforcement DoDD 5525.5

- An exception to PCA allowing certain support to law enforcement
  - Sharing information
  - Loan of equipment and facilities
  - Maintenance and operation of equipment

Expert Advice and Training
DoDD 5525.5

- Training
  - Basic v. advanced military skills
- Advice
  - Includes MWD team
  - WMD
- Approval authoritie

Court-Recognized Exception

Military Purpose Doctrine

- DoDD 5525.5, encl. 4
- Actions taken for primary purpose of furthering a military or foreign affairs function of the US, regardless of incidental benefit to civilian authorities

Court-Recognized Exception

- Military Purpose Doctrine
  - Investigations and other actions related to enforcement of the UCMJ
  - Protection of classified information or equipment
  - Protection of DoD personnel, DoD equipment, and official guests of the DoD

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Civil Disturbances

Civil Disturbances

- **President's Authority:**
  - **Constitution**
    - **Art. 4 § 4**
  - **"Insurrection Act"**
    - **10 U.S.C. §§ 331-335**
- **DoD Authority:**
  - **3025.15; 3025.12**
  - **Exception to PCA**
  - **DOJ in charge**
  - **DoD Exec Agent: ASD/HD; JDOMS now pa of JCS**

PRESIDENT'S CONSTITUTIONAL AUTHORITY

- **Article II, Section 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States...."**
- **Article IV, Section 4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."**

“Insurrection Act”

- 10 U.S.C. §§ 331-335, 672
- Now called “Enforcement of the Laws to Restore Public Order”
- Effectuates President’s constitutional authority to:
  - provide assistance to a state to suppress an insurrection
  - enforce Federal authority or suppress a rebellion
  - suppress an insurrection, domestic violence, unlawful combination, or conspiracy that deprives any part or class of people of rights, and state unable to provide protection of law
  - order insurgents to disperse and retire peaceably to their abodes within a limited time
  - restore public order as result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack, or other condition beyond State’s ability to maintain public order

(amended by FY 07 National Defense Authorization Act)

“Insurrection Act”

- Provision of supplies, services and equipment now authorized by 10 U.S.C. § 2567 (added by FY 07 National Defense Authorization Act)
  - “may include food, water, utilities, bedding, transportation, tentage, search and rescue, medical care, minor repairs, the removal of debris, and other assistance necessary for the immediate preservation of life and property”
  - but only if State unable to provide it, only until other responsible authorities can provide it, and only if does not interfere with military preparedness
- Not subject to certain Stafford Act requirements for utilization of DoD resources (e.g., request by Governor of affected State, debris removal, certain expenditure restrictions)

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Counterdrug Support

Luis Acosta / AFP file

Counterdrug Support

Counterdrug support

- 10 USC §§ 371- 381
  - Congressional intent to allow greater counterdrug support
- Joint Publication 3-07.4, Joint Counterdrug Operations
- Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3710.01A, DOD Counterdrug Support

Counterdrug Support

- National Defense Authorization Act, FY 1991, Section 1004
- Primary authority for support (non-reimbursable)
  - Maintenance and repair of equipment
  - Transportation of personnel/supplies/ equipment
  - Training
  - Detection and monitoring
  - Aerial and ground reconnaissance

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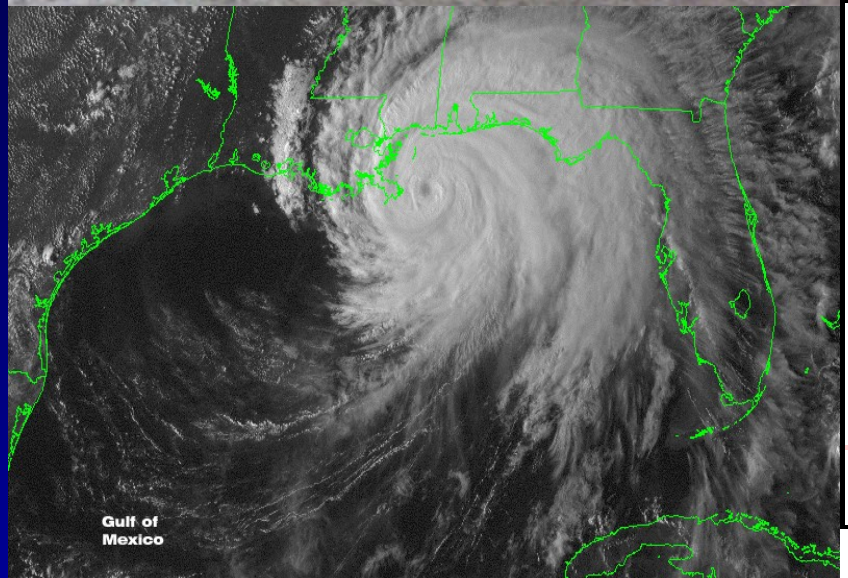
Disaster/Emergency



(CNN/file)

Military Disaster Support to Civil Authorities

- Likely to be humanitarian in nature
- US forces will likely be unarmed
- NG under state law unless federalized

"Major Disaster"

- NATURAL CATASTROPHE: including any hurricane, tornado, storm, high water, tidal, wave, earthquake, volcanic eruption, ...OR
- FIRE (regardless of cause) OR
- FLOOD, or (regardless of cause) OR
- EXPLOSION (regardless of cause) OR
- AND damage of sufficient severity and magnitude to warrant major disas assistance

Precedents

- 1865 – Disaster Relief through the Freedman's Bureau
- Late 1800s - Great Chicago Fire
- Late 1800s - Johnstown Flood
- Late 1800s - Charlestown Earthquake
- 1992 – Hurricane Andrew
- 1998 – New York Ice Storm
- Numerous deployments in support of domestic disaster relief missions

Authority to Provide Disaster Assistance

- Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974
- Department of Defense Directives:
  - DoDD 3025.1, Military Support to Civil Authorities
  - DoD 3025.1-M, Manual for Civil Emergencies
  - DoDD 3025.15, Military Assistance to CAs
  - Draft Joint Pub 3-07.7, Doctrine for Civil Support
- Service Regulations

Stafford Act

- 42 U.S.C. § 5121, et seq.
- Primary legal authority for federal gov't to participate in domestic disaster relief
- Applies in 50 States, DC, Puerto Rico, Virgin Islands, Guam, American Samoa, No. Mariana Islands, and Trust Territories of Pacific Islands
- FEMA's statutory basis for disaster relief
- DoD has NO independent statutory basis to provide disaster assistance.

Stafford Act

- Under Stafford Act, President may direct federal agencies, including DoD, to provide:
  - Personnel, equipment, supplies, facilities, and managerial, technical, and advisory services
- One of Three Scenarios:
  - Presidential Order to perform emergency work essential to preserve life and property
  - Presidential Declaration of a major disaster
  - Presidential Declaration of an emergency

Service Regulations

- Air Force Instruction 10-802, Military Support to Civil Authorities
  - Implements DoDD 3025.1
  - Specific guidance on funding and reimbursement, reporting requirements, and establishes emergency priorities
  - Sets forth the immediate response authority of an installation commander

Operational Issues

- Stafford Act is NOT an exception to
  - Traffic control points
  - Patrolling
  - Security at supply depots
  - Force protection

- Use of Force
  - Guidelines issued in mission order
  - Inherent right to self-

Immediate Response Authority

- Authority - 3025.15; 3025.1
- Authorizes local military commanders to take action to save lives, prevent human suffering, or mitigate great property damage
  - Imminently serious conditions
  - Time does not permit approval from higher HQ

Immediate Response Authority

- Support authorized
  - Rescue, evacuation, emergency treatment of casualties
  - Emergency restoration of power
  - Food distribution

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Chemical, Biological, Radiological, Nuclear and High-Yield Explosives Support

Chemical, Biological, Radiological, Nuclear and High-Yield Explosives Support

- JCS CONPLAN 0500-98, *Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear and High-Yield Explosive Situation* (11 Feb 2002)
- Presumes units will deploy unarmed
  - Requires SecDef consultation with Attorney General to authorize arms
- Force protection is the responsibility of local law enforcement

National Defense Areas

- Internal Security Act of 1950 (50 USC 797)
- DoDD 5200.8 (Apr 91)
- AFI 31-101, 3.5 (Dec99)

When Are They Used?

- **To contain and secure resources on non-federal lands within U.S.**
- **<u>May</u> be made necessary (examples)**
  - **Aircraft crashes**
  - **Emergency dispersal of aircraft to civilian airports**
- **Less discretion**
  - **Immobilized Nuke ground convoys**
  - **Special weapons involved**

NDAs: *Law Enforcement*

- Contact civilian law enforcement agency (CLEA)
- Request assistance:
  - Crowd control
  - Arrest & Apprehension
- If they refuse, we may detain
- Use of force may be an issue
  - Check AFI 31-207, Arming and Use of Force by AF Personnel

Overseas

- U.S. authorities don’t apply outside the U.S.
- Check the Status of Forces Agreement (SOFA)
- If no SOFA or it doesn’t cover NDA issues, is there some other bilateral agreement?
  - e.g., NATO STANAG 3531, Safety Investigation and Reporting of Accidents/Incidents involving Military Aircraft and/or Missiles

NATO STANAG 3531

- Para 14
  - Military authority of occupying nation responsible for all measures taken when involves only their aircraft within limits of airfield
- Para 27
  - Nation of occurrence responsible to guard scene throughout investigation & ensure undisturbed until safety investigation is complete

NATO STANAG 3531

- Para 27 (cont)
  - If the operating nation provides guards to assist in securing the scene of the accident/incident, these guards shall abide at all times by the laws and regulations of the nation of occurrence

NATO STANAG 3531

- Para 9
  - Nation of occurrence ultimately responsible for investigating accident
- U.S. under authority of Para 11 has reserved the right to conduct an independent safety investigation instead of convening a committee comprised of the involved nations

NATO STANAG 3531

- Para 16
  - Communication with the press shall not be made without previous consultation between the two nations
- STANAG 3531 has not been ratified by all NATO members – signatories may have taken reservations – ALWAYS consult with JA before taking action off the installation

Claims

- **Injured parties**
- **Landowners**
- **Payments**
- **Admissions**
- **Pictures**

Claims in NATO

- Losses to local nationals are considered under the provisions of Article VIII of the NATO SOFA

- Losses to U.S. military and civilian personnel are considered under the military claims act as implemented by AFI 51-501

Environmental Issues

- General concern will be about “releases”
  - Leaks, leaching, etc
  - Any UNPERMITTED releases
- Person in charge must report
  - detect, prevent, & abate a release
- CEV should be POC

Liability

- Civil liability
  - Monetary liability for the Air Force
  - “scope of employment”
- Criminal liability
  - CERCLA:
    - Failure to notify immediately after knowledge of release
    - False or misleading notification
    - Penalty: 5 years confinement and/or $250,000 fine
  - EPCRA:
    - Violation of notification provision
    - Knowing and willful
    - Penalty: 5 years; $50,000

Environmental Issues Overseas

- Final Governing Standards – Combine U.S. and host nation standards to provide baseline for environmental compliance

- Extremely important to ensure coordination with CEV and JA to ensure proper notifications are made

Summary

- Posse Comitatus
- Defense Support of Civil Authorities
- National Defense Areas
- Environmental Laws
- Claims

Questions?